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WAN MARZUKI WAN ABDULLAH

v.

PP

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FEDERAL COURT, PUTRAJAYA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
AUGUSTINE PAUL FCJ
JAMES FOONG FCJ
[CRIMINAL APPEAL NO: 05-56-2008 (T)]

C

27 MAY 2010

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(2) - Trafficking in cannabis - Whether there was actual delivery of drugs - Whether negotiation constituted sale of drugs*

D

CRIMINAL PROCEDURE: *Appeal - Appeal against conviction and sentence - Trafficking in cannabis - Concurrent findings of fact by trial judge and Court of Appeal - Whether findings of fact by trial judge perverse - Whether trial judge erred in evaluation of appellant's version - Whether appellate intervention warranted*

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The appellant was convicted and sentenced to death by the High Court on a charge under s. 39B(2) of the Dangerous Drugs Act 1952 ('DDA'). His appeal to the Court of Appeal was also dismissed and hence this appeal. The prosecution's case was that, pursuant to an arrangement made by the informer ('PW8'), Detective Corporal Mahmood bin Noor ('PW5') met with the appellant in relation to a sale and purchase of cannabis and the appellant had agreed to make available the cannabis. The prosecution led evidence that on the agreed date, PW5 arrived at the petrol station at Bukit Jong Kuala Terengganu and shortly thereafter the appellant arrived, holding a blue bag. From the blue bag he took out a pink coloured bag ('P10'). According to PW5, he could then smell cannabis. Subsequently, PW5 gave the agreed signal to the police party waiting in ambush and the appellant was arrested. The content of P10 was confirmed to be 3224.47 grams of cannabis. The learned trial judge, upon finding a *prima facie* case, called the appellant to enter his defence. The appellant in his defence denied delivering the drugs and said that he was at the place to collect his debt from PW8. The appellant, in this appeal, raised substantially the same issues raised in the Court of Appeal, *inter alia*, (i) that the act of the appellant did not amount to sale of the drugs as there was no actual delivery of the substance; and (ii) that the learned trial judge erred in evaluating

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the version of the appellant. On the first issue, the appellant contended that the negotiation did not constitute a sale of the proscribed drugs and there was no actual delivery as understood in law, relying on the case of *PP v. Saari Jusoh*. A

Held (dismissing appeal; affirming conviction and sentence by courts below) B
Per Richard Malanjum CJ (Sabah and Sarawak) delivering the judgment of the court:

(1) The case of *Saari Jusoh* held the view that to constitute actual delivery it would not be necessary for the agreed price to be paid just upon physical delivery of the drugs itself. Thus, in the present case, the non-payment of the agreed price should not mean that there was no actual delivery of the drugs on the appointed day. The court was in agreement with the view expressed by the Court of Appeal that actual delivery is a question of fact and degree and it depends on the particular facts of an individual case. (paras 17-19) C D

(2) There was a concurrent findings of fact by the courts below on the actual delivery of the drugs by the appellant to PW5 and the finding was not perverse or obviously unsupported by the evidence adduced or that no reasonable trier of facts could have come to such conclusion. Hence, the court, being the final appellate court, should be slow in interfering with such findings of fact. (para 20) E F

(3) There was also no merit in the contention that there was incomplete sale and that there was no actual delivery of the drugs in issue. If the appellant, as stated in his evidence, met PW5 and PW8 to demand payment from PW8 the money owed, then there was no reason for him to deal with PW5 at the meeting. There was also no evidence adduced to indicate that PW5 had framed the appellant. The contention that there was no actual delivery and thus no completed sale of drugs also ran counter to the appellant's defence. The question of negotiation and sale of drugs should not arise as it would have been quite irrelevant to his defence. (paras 21-23) G H

(4) The discrepancies, ie on the inadequate consideration by the trial judge of certain material evidence and contradictory account by PW5 on the number of packets found inside the bag, were not material so as to render the findings of fact by the learned trial judge unsafe. On the contrary they indicate truthfulness in the evidence of PW5. (paras 24-27) I

(5) The complaint by the appellant that the search list did not state where the drugs were found was without substance. The omission was minor and one which could be and was in fact clarified in the court by the relevant witnesses. There was no reason to consider the omission fatal as to render the evidence of the relevant witnesses otiose. (paras 28-32)

(6) The appellant in his testimony stated that there were five persons present during the negotiation of the sale and purchase of the drugs, when the prosecution's case stated there were only four. The appellant should have called his friend who was present at the meeting as witness to support his version instead of blaming the prosecution for failure to call the person. In the circumstances, there was no question of suppression of witness by the prosecution. (paras 35-37)

Bahasa Malaysia *Translation Of Headnotes*

Perayu disabitkan dan dihukum mati oleh Mahkamah Tinggi atas pertuduhan di bawah s. 39B(2) Akta Dadah Berbahaya 1952 ('ADB'). Rayuannya ke Mahkamah Rayuan juga ditolak dan dengan itu rayuan ini. Kes pihak pendakwaan adalah bahawa, berikutan satu pengaturan yang dibuat oleh pemberi maklumat ('PW8'), Detektif Koperal Mahmood bin Noor ('PW5') bertemu dengan perayu berkaitan dengan jual beli kanabis dan perayu telah bersetuju untuk menyediakan kanabis tersebut. Pihak pendakwaan juga mengemukakan keterangan bahawa pada hari yang dipersetujui, PW5 tiba di stesen petrol di Bukit Jong Kuala Terengganu dan seketika kemudian perayu tiba, memegang sebuah beg berwarna biru. Daripada beg biru tersebut, dia mengeluarkan sebuah beg berwarna merah jambu ('P10'). Menurut PW5, dia boleh menghidu bau kanabis pada waktu itu. Selepas dari itu, PW5 memberikan isyarat yang dipersetujui kepada pasukan polis yang sedang mengendap dan perayu kemudian ditangkap. Kandungan P10 disahkan sebagai 3224,47 gram kanabis. Hakim perbicaraan, selepas mendapati kes *prima facie*, memanggil perayu membela diri. Perayu di dalam pembelaannya menafikan menyerahkan dadah tersebut dan menyatakan bahawa dia berada di tempat tersebut untuk mengutip hutangnya daripada PW8. Perayu, di dalam rayuan ini, membangkitkan secara substansial isu-isu sama yang dibangkitkan di Mahkamah Rayuan, antara lain, (i) bahawa tindakan perayu tidak membentuk jualan dadah kerana tidak ada penghantaran sebenar bahan tersebut; dan (ii) bahawa hakim perbicaraan terkhilaf dalam menilai versi perayu. Berkaitan isu pertama, perayu menghujah bahawa tawar menawar tidak

membentuk jualan dadah yang diharamkan dan tidak ada penghantaran sebenar seperti yang difahami dari segi undang-undang dengan bergantung kepada kes *PP v. Saari Jusoh*.

Diputuskan (menolak rayuan; mengesahkan sabitan dan hukuman mahkamah-mahkamah di bawah)
Oleh Richard Malanjum HB (Sabah dan Sarawak) menyampaikan penghakiman mahkamah:

(1) Kes *Saari Jusoh* memutuskan bahawa untuk membentuk penghantaran sebenar, tidak perlu wujud pembayaran harga yang dipersetujui selepas penghantaran sebenar dadah itu. Dengan itu, di dalam kes ini, tidak membayar harga yang dipersetujui tidak wajar bermaksud bahawa tidak ada penghantaran sebenar dadah pada hari yang ditetapkan. Mahkamah bersetuju dengan pendapat yang diberikan oleh Mahkamah Rayuan bahawa penghantaran sebenar adalah soalan fakta dan tahap dan ia bergantung kepada fakta sesuatu kes itu sendiri.

(2) Terdapat dapatan fakta yang bersesama oleh mahkamah-mahkamah bawahan berkaitan dengan penghantaran sebenar dadah tersebut oleh perayu kepada PW5 dan dapatan tersebut bukan sesuatu yang bertentangan atau tidak disokong oleh keterangan yang dikemukakan atau sesuatu yang tidak ada hakim yang munasabah akan mungkin mencapai keputusan seperti itu. Maka mahkamah ini, sebagai mahkamah rayuan terakhir, sewajarnya tidak campur tangan dalam dapatan fakta tersebut.

(3) Tidak ada merit di dalam hujahan bahawa tidak ada jualan yang disempurnakan dan bahawa tidak ada penghantaran sebenar dadah yang dipertikaikan. Jika perayu, seperti yang dinyatakan di dalam keterangannya, berjumpa PW5 dan PW8 untuk menuntut bayaran daripada PW8 wang yang dihutangnya, maka tidak ada alasan untuknya berurusan dengan PW5 dalam pertemuan tersebut. Juga tidak ada keterangan dikemukakan untuk menunjukkan bahawa PW5 telah menganiaya perayu. Hujahan bahawa tidak ada penghantaran sebenar dan oleh itu tidak ada jualan dadah yang disempurnakan juga bercanggah dengan pembelaan perayu. Persoalan tawar menawar dan jualan dadah tidak harus timbul kerana ia tidak relevan kepada pembelaannya.

A **(4)** Percanggahan, iaitu berkaitan dengan pertimbangan yang tidak mencukupi oleh hakim perbicaraan berkaitan dengan perkara tertentu dan pernyataan bercanggah oleh PW5 tentang jumlah bungkusan yang ditemui di dalam beg tersebut, adalah tidak penting dan tidak menyebabkan dapatan fakta oleh hakim B perbicaraan tidak selamat. Sebaliknya, ia menunjukkan kebenaran dalam keterangan PW5.

(5) Aduan perayu bahawa senarai carian tidak menyatakan di mana dadah tersebut ditemui adalah tanpa asas yang kukuh. C Peninggalan tersebut adalah kecil dan sesuatu yang boleh dan sebenarnya dijelaskan oleh mahkamah melalui saksi-saksi yang relevan. Tidak ada sebab untuk menimbangkan bahawa peninggalan tersebut menjejaskan sehingga menyebabkan keterangan saksi-saksi relevan tersebut lewah.

D **(6)** Perayu di dalam keterangannya menyatakan bahawa terdapat lima orang yang hadir semasa tawar menawar jual beli dadah tersebut, sementara kes pendakwaan menyatakan hanya empat yang hadir. Perayu sepatutnya memanggil rakannya yang turut hadir dalam pertemuan tersebut sebagai saksi untuk menyokong E versinya dan bukan menyalahkan pihak pendakwaan atas kegagalan memanggil orang itu. Dalam keadaan tersebut, tidak ada persoalan penyekatan saksi oleh pihak pendakwaan.

Case(s) referred to:

F *Gunalan Ramachandran & Ors v. PP [2006] 1 CLJ 857 FC* ***(refd)***
Herchun Singh & Ors v. PP [1969] 1 LNS 52 FC ***(refd)***
Lai Kim Hon & Ors v. PP [1980] 1 LNS 197 FC ***(refd)***
Lim Kheak Teong v. PP [1984] 2 CLJ 219; [1984] 1 CLJ (Rep) 207 FC ***(refd)***
G *PP v. Saari Jusoh [2007] 2 CLJ 197 FC* ***(foll)***
Wan Marzuki Wan Abdullah v. PP [2008] 4 CLJ 631 CA ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 78
Dangerous Drugs Act 1952, ss. 2, 39B(2)

H *For the appellant - Dato' Sukri Hj Mohamed; M/s Wan Haron Sukri & Nordin*
For the respondent - Saiful Edris Hj Zainuddin; DPP

[Editor's note: For the Court of Appeal judgment, please see Wan Marzuki Wan I *Abdullah v. PP [2008] 4 CLJ 631.]*

Reported by S Barathi

JUDGMENT

Richard Malanjum CJ (Sabah & Sarawak):

[1] The appellant was convicted and sentenced to death by the High Court on a charge under s. 39B(2) of the Dangerous Drugs Act 1952 (the Act). His appeal to the Court of Appeal was dismissed. He now appeals to this court.

[2] The facts have been lucidly and concisely set out by the Court of Appeal in its judgment: *Wan Marzuki Wan Abdullah v. PP* [2008] 4 CLJ 631. Thus, in this judgment we need only to highlight those critical aspects of the facts.

[3] The prosecution's case is that PW5 (Detective Corporal Mahmood bin Noor) met the appellant on 19 December 1999. The meeting was arranged by PW8 (Mohd Nasrul Alimi bin Mohamad) an informer. The purpose of the meeting was in relation to sale and purchase of cannabis, a proscribed drug under the Act.

[4] It was the evidence of PW5 that the appellant agreed to make available 5kg of cannabis at the agreed price of RM900 per kg and that the transaction would be completed on 21 December 1999.

[5] Thus, the prosecution led evidence that on the appointed date PW5 was at the petrol station at Bukit Jong, Kuala Terengganu. Soon after the appellant arrived carrying with him a blue bag (exh. P11). He met PW5. From inside the bag the appellant took out a pink coloured bag (exh. P10) to show to PW5.

[6] According to PW5 he could smell cannabis. Thereafter he requested the appellant to put back exh. P10 into exh. P11. The appellant did so and placed exh. P11 on the cement floor near PW5. The agreed signal was then given by PW5 to the police party who were by prior arrangement waiting in ambush nearby.

[7] Subsequently the appellant was arrested. Investigation proceeded with the contents of exh. P10 sent to the chemistry department for analysis. From the chemical analysis it was found that exh. P10 contained 3224.47g of cannabis.

[8] After hearing the evidence led by the prosecution the learned trial judge ruled that there was *prima facie* case for the appellant to answer and called upon him to enter his defence.

[9] In his defence the appellant denied delivering the drug. He explained that PW8 owed him money and he was at the place to collect the repayment.

[10] At the conclusion of the trial the learned trial judge held that the version of the appellant did not cast any reasonable doubt on the prosecution's case and that the prosecution had established its case beyond reasonable doubt against the appellant.

[11] Before the Court of Appeal learned counsel for the appellant raised two main issues, namely, (i) that the acts of the appellant did not amount to sale of the drug in question as there was no actual delivery of the substance; and (ii) that the learned trial judge erred in evaluating the version of the appellant. The Court of Appeal rejected both contentions and proceeded to dismiss the appellant's appeal.

[12] In respect of issue (i) the Court of Appeal gave a concise but illuminating reason for rejecting it. It held thus: (per Gopal Sri Ram JCA):

> In our judgment whether there is actual delivery is a question of fact and of degree. It depends on the particular facts of an individual case. Varying fact patterns may be envisaged. An accused (as vendor) may physically hand the drug to the buyer (usually an agent provocateur). Or he may place it near the buyer. Or he may make it readily available for the buyer to take control of it as happened in *Sa'ari Jusoh*. Or he may place it in a vehicle or a room and hand the keys to the same to the buyer. In all these cases there is actual delivery. There may be cases where delivery is constituted by more than one act. Take this very case. The acts of the appellant in bringing the drug to the petrol station and placing it near PW5 when taken cumulatively constitute actual delivery.

[13] As regards issue (ii) the Court of Appeal held:

> There is clear authority for the proposition that in an appeal of this nature which turns on questions of fact particularly in relation to issues of credibility, this court will be reluctant to interfere with the findings made by the primary trier of fact. We need go no further than to quote the following passage from the judgment of Shaik Daud JCA in *Andy Bagindah v. PP* [2000] 3 CLJ 289:

> There is no dearth of authorities to say that in every case, there are bound to be contradictions and discrepancies. The question to be decided by the trial judge is whether those contradictions and/or discrepancies are material ones so as to strike at the very root of the charge. It is for the trial judge to consider this since he was the one who saw and heard the evidence. In the present case the learned judge concluded that there were discrepancies but those discrepancies were not material ones. Since this involved the credibility of witnesses, we held that the learned judge was a better person to decide and an appellate court ought not to interfere with such findings.

[14] Before us learned counsel for the appellant raised substantially the same points as submitted before the Court of Appeal.

[15] On the first point he argued that negotiation did not constitute a sale of the proscribed drug. Further, in this case there was no actual delivery as understood in law. He cited the case of *PP v. Saari Jusoh* [2007] 2 CLJ 197.

[16] In *Saari Jusoh*'s case (*supra*) on the issue of delivery under s. 2 of the Act this court said:

> Per Augustine Paul FCJ:
>
> Applying the approach of strict construction, we note that section 2 of the Act does not employ the expressions 'agreement to sell' or 'agreement to buy' to fall within the definition of trafficking. Accordingly, in our judgment, a mere agreement to buy or sell a proscribed drug is not an act of trafficking within section 39B(1)(a) of the Act. Neither, we may add, do negotiations for a sale amount to the offence of trafficking within section 39B(1)(a). Whether they are caught by other provisions of the Act is a matter that must await decision in some future case.
>
> On the facts of the present case, it is our judgment, that *to constitute the act of 'selling' within section 2 of the Act, there must have been an actual delivery of the drugs by the appellant accompanied by the physical handing over of the agreed price by the agent provocateur in exchange. In other words, the transaction must have been completed.* Anything short of this is insufficient on the instant facts as it would admit a more lenient; a more flexible; approach to the construction of a penal statute. And that, on the authorities already discussed, is impermissible. Needless to say such a completed transaction did not take place in the present instance because the trap was sprung too early. (emphasis added).

> **A sale is therefore complete upon transfer of the property in the goods even though the price has not been paid**. A sale in this sense cannot therefore be described as an act preparatory to the sale or as negotiations leading to the sale or even as an agreement for a sale. (emphasis added).

Per Abdul Aziz FCJ:

> For my part, in considering the dictionary meaning of "sell" for the purpose of determining the ordinary meaning of "selling" in the definition of "trafficking", I would reject Webster's meaning No. 2, without having to resort to the existence of paras (b) and (c) of s. 39B(1), as one that could not have been intended by the legislature. The meaning intended is meaning No. 1, which for the present case is "to ... deliver ... goods ... for money". *So long as the delivery is for money - which the delivery in this case was - as opposed to delivery as a gift or on some other basis, it is selling even though the money for which the goods are delivered has not passed to the seller.* (emphasis added).

[17] On cursory reading of the separate judgments given in *Saari Jusoh*'s case (*supra*) one would get the impression that there was a divergence in opinion on the issue of delivery and the payment of the agreed price. However, on careful analysis both the judgments held the view that to constitute actual delivery it would not be necessary for the agreed price to be paid upon physical delivery of the drug itself. Thus, in the present case the non-payment of the agreed price should not mean that there was no actual delivery of the drug on the appointed day.

[18] On the issue of 'actual delivery' the Court of Appeal in this present case said:

> In our judgment *whether there is actual delivery is a question of fact and of degree. It depends on the particular facts of an individual case.* Varying fact patterns may be envisaged. An accused (as vendor) may physically hand the drug to the buyer (usually an agent provocateur). Or he may place it near the buyer. Or he may make it readily available for the buyer to take control of it as happened in *Sa'ari Jusoh*. Or he may place it in a vehicle or a room and hand the keys to the same to the buyer. In all these cases there is actual delivery. There may be cases where delivery is constituted by more than one act. Take this very case. The acts of the appellant in bringing the drug to the petrol station and placing it near PW5 when taken cumulatively constitute actual delivery. (emphasis added).

[19] We are entirely in agreement with the view expressed by the Court of Appeal on what constitutes 'actual delivery' thus elucidating the issue as earlier propounded in *Saari Jusoh*'s case (*supra*). A

[20] And we observe in this instant case that there was a concurrent finding of fact by both the courts below on the actual delivery of the drug by the appellant to PW5. In particular, the learned trial judge who had the advantage of audio-visual of all the witnesses during their testimonies, including the appellant, did not believe the version of the appellant and held that it did not cast any reasonable doubt on the prosecution's case. As such being the final appellate court we should be slow in interfering with such finding of fact. (see: *Herchun Singh & Ors v. PP* [1969] 1 LNS 52; *Lim Kheak Teong v. PP* [1984] 2 CLJ 219; [1984] 1 CLJ (Rep) 207). At any rate we do not find such finding of fact perverse or obviously unsupported by the evidence adduced or that no reasonable trier of facts would have come to such conclusion. B C D

[21] In his evidence on oath the appellant testified that he met PW5 and PW8 on 19 December 1999 to demand payment from PW8 for money owed. If indeed there was any truth in the assertion there was no reason for him to deal with PW5 during the meeting at the petrol station on the evening of 21 December 1999. Further, there was not an iota of evidence adduced to indicate that PW5 framed the appellant with the drug found inside the bag (exh. P11). E F

[22] We would add that in submitting for the appellant that there was no actual delivery and thus no completed sale of the drug, it ran counter to the original version of the appellant that he went to the petrol station hoping to collect payment from PW8 for money owing. Moreover, if indeed there was any truth in the appellant's version the question of negotiation and sale of drug should not arise. It would have been quite irrelevant to his defence. Thus, in submitting as he did learned counsel for the appellant had not only inadvertently rendered credence to the testimonies of PW5 and PW8 but had probably strengthened them as well. G H

[23] For the foregoing reasons we therefore find no merit in the contention that there was incomplete sale and that there was no actual delivery of the drug in issue. I

[24] Next, learned counsel for the appellant submitted that there was no or inadequate consideration of certain material evidence adduced in this case by the learned trial judge. He made reference to at least five items, namely, the police report, the opening statement of the prosecution, the search list, the contradictions in the oral testimony of PW5 and his police report and the unexplained missing material witness by the name of Mokzani Mohamad.

[25] As regards the police report (exh. P34) and the oral testimony of PW5 it was highlighted that PW5 gave contradictory account on the number of packets found inside the bag (exh. P11).

[26] Learned counsel contended that in his oral evidence PW5 said that there were three big packets and one small packet found inside the bag while under cross-examination he agreed that there were three big packets and two small packets consonant with what was reported in the police report. These discrepancies according to learned counsel were not considered or adequately taken into account by the courts below before coming to their respective decisions.

[27] With respect, we do not think such discrepancies are material as to render unsafe the finding of fact by the learned trial judge. On the contrary they indicate truthfulness in the evidence of the witness PW5. In *Lai Kim Hon & Ors v. PP* [1980] 1 LNS 197; [1981] 1 MLJ 84 at p. 93 Abdul Hamid FJ (as he then was) said this:

> Viewed as a whole it seems clear that the finding of fact made by the trial judge turned solely on the credibility of the witnesses. The trial judge heard the testimony of each witness and had seen him. He also had the opportunity to observe the demeanour of the witnesses. Discrepancies will always be found in the evidence of a witness but what a judge has to determine is whether they are minor or material discrepancies. And which evidence is to be believed or disbelieved is again a matter to be determined by the trial judge based on the credibility of each witness. In the final analysis it is for the trial judge to determine which part of the evidence of a witness he is to accept and which to reject. Viewed in that light we did not consider it proper for this court to substitute its findings for that of the learned trial judge.

(see also: *Gunalan Ramachandran & Ors v. PP* [2006] 1 CLJ 857).

[28] Learned counsel also submitted that the before coming to his findings the learned trial judge failed to consider adequately the contents of the opening statement of the learned Deputy Public Prosecutor. He further complained that the search list adduced did not state where the drug was found.

[29] In response the learned deputy argued that the complaint raised was not included in the Petition of Appeal and that this court should not consider it at all.

[30] Notwithstanding that the issue was not included in the Petition of Appeal we took the liberty to consider it. And having done so we find the complaint to be without any substance.

[31] The contents of the opening statement of the learned deputy should not be taken as conclusive so as to disallow any further evidence to be adduced irrespective of it being fresh or consequential. We would further say that an opening statement in any trial should be taken as merely a guide to the court and the parties before it of the evidence likely to be adduced in order to prove or rebut a charge, claim or defence thereof. Indeed, an opening statement should not be allowed to lock out any fresh or clarifying evidence which may be relevant and necessary in the interest of justice.

[32] As for the search list we are of the view that the omission is minor and one which could be and was in fact clarified in court by the relevant witnesses called. There is no reason why the omission should be considered fatal as to render the evidence of the relevant witnesses otiose.

[33] In any event the learned trial judge did analyse the evidence adduced including the oral testimonies of the witnesses called by the prosecution and the appellant. He came to his findings with the advantage of having the audio-visual of the witnesses called. Thus, as we have said earlier on in this judgment the finding of fact by the learned trial judge should be given due weight and deference.

[34] And in the final analysis having the benefit of the evidence adduced as a whole the learned trial judge did not believe the version of the appellant labeling it as one of recent invention and came to the conclusion that the prosecution had established its case beyond reasonable doubt against the appellant.

[35] The other issue raised by learned counsel was the failure by the prosecution to call a person alleged to have been present during the negotiation for the sale and purchase of the drug. According to learned counsel such fact was not even disclosed by the prosecution.

[36] In reply the learned deputy highlighted the evidence of PW5 and PW8. They testified that during the first meeting on 19 December 1999 there were four persons present. The appellant was with his friend who was unknown to them. The appellant on the other hand testified that there were five persons present.

[37] Irrespective of the number of persons present during that first meeting we would have thought that at least the appellant should have called his friend present at the meeting as a witness to support his version instead of blaming the prosecution which did not know that person. As such there was no question of suppression of a witness as contended by the learned counsel for the appellant.

[38] We have also considered the other issues raised by learned counsel for the appellant not specifically dealt with in this judgment. Even if we are with the appellant on those issues we find them of little consequence to our final decision.

[39] Accordingly and having considered the arguments marshaled before us and for the reasons given above we hereby dismiss this appeal. The conviction found and sentence imposed upon the appellant by the courts below are hereby affirmed.

[40] Finally, we are very much conscious of the delay in coming up with this judgment. However it is not without reason. On completion of hearing of this appeal before a panel of three judges our learned brother the late Augustine Paul FCJ was assigned to write the judgment. Unfortunately he fell ill at intervals. We were hopeful that he would recover and complete the task. Unfortunately it did not happen. He passed away peacefully. We, the remaining members of the coram thus assumed the responsibility of writing this judgment. We are entitled to proceed to consider and decide this appeal pursuant to s. 78 of the Courts of Judicature Act 1964. As our decision is unanimous *de-novo* hearing is therefore unnecessary.